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IN THE

Supreme Court of the ~~United States~~

REPUBLICAN PARTY OF MINNESOTA, ET AL.,
Petitioners,

v.

VERNA KELLY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate

[1] This brief was authored in its entirety by undersigned counsel for amicus curiae. No person or entity, other than the named amicus curiae and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the fair and proper administration of justice.

Consistent with these objectives, NACDL supports reasonable State efforts to regulate statements by sitting judges and candidates for judicial office announcing how they would rule in cases likely to come before them. NACDL has a particular interest in the conduct of judicial elections, because judicial candidates too often run for election on promises to be tough on criminal defendants, and run for reelection based on how they have followed through on those promises. NACDL has long been concerned that such campaign promises are inconsistent with the judicial role and make it more difficult for criminal defendants to receive fair trials. NACDL submits this brief to demonstrate that States have compelling interests supporting reasonable measures, such as Minnesota's Canon 5(A)(3)(d)(i), that prevent judicial candidates from making campaign commitments that can actually skew the administration of justice against unpopular litigants like criminal defendants or at a minimum create the appearance of prejudice and bias.

SUMMARY OF ARGUMENT

This is not a case about regulating the speech of candidates for *political* office. Judges – including elected judges – belong to an institution that is fundamentally *apolitical* and that depends for its very legitimacy on remaining at all times scrupulously impartial. Whereas officials in the political branches of government are quite properly elected on the basis of promises to effectuate policy commitments, and are

expected while in office to take the opinions of voters into account when making their decisions, basic notions of due process and the nature of the judicial role bar judges from doing the same. While deciding cases, judges must be independent of external political forces and must base their actions only on the law and the evidence before them. It is an emphatic first principle that judges' loyalty is owed *not* to those who selected them, but to the law itself.

Minnesota does not somehow forfeit its interests in maintaining an impartial and apolitical judiciary when it decides to elect its judges. On the contrary, the principles of due process do not change, and neither does the judge's basic obligation of fealty to the law. Thus, Minnesota has adopted a number of special safeguards in connection with judicial elections — not least of which is Canon 5(A)(3)(d)(i) itself — that draw a clear distinction based upon the special nature of the judicial role between elections for judicial office and elections for political office, and that demonstrate the State's intent to preserve judicial independence within the context of an elected system. Far from relinquishing its interest in avoiding judicial prejudice or the appearance of prejudice, Minnesota's decision to elect its judges makes its need for safeguards more acute.

Canon 5(A)(3)(d)(i) has been narrowly construed by the Minnesota Supreme Court to restrict judges only from making known how they would decide issues likely to come before them as judges. The State of Minnesota has at least three compelling interests that justify regulating this limited class of speech by judges and judicial candidates. First, Minnesota has a compelling interest in protecting the actual integrity of the judiciary. Second, Minnesota has a compelling interest in avoiding even the *appearance* of judicial prejudice and bias. Finally, given that court decisions can be (and regularly are) challenged on grounds of judicial prejudice, Minnesota has a compelling interest in avoiding the costs of litigating allegations of bias and protecting the final-

ity of its judgments. The best evidence that these concerns are real and not hypothetical are examples of actual campaign statements candidates have made in recent judicial elections — as well as statements made by sitting judges up for re-election touting how they have actually followed through on their earlier campaign promises while on the bench.

ARGUMENT

I. JUDGES ARE FUNDAMENTALLY DIFFERENT FROM POLITICAL OFFICIALS, AND JUDICIAL ELECTIONS ARE FUNDAMENTALLY DIFFERENT FROM ELECTIONS FOR POLITICAL OFFICE.

Unlike other public officials, judges — whether elected or selected — play a non-political role in our system of government. An independent and impartial judiciary is the cornerstone of *every* State's system of justice. Basic principles of due process require that judges decide the cases before them on the law and the merits, not on the basis of campaign or nomination promises or their notion of the contemporary popular will. Contrary to the suggestions of Petitioners and their *amici*, by deciding to elect its judges, a State does not somehow forfeit its interest in preventing judges from prejudging the cases they will hear, nor make a choice to sacrifice its judges' day-to-day independence in favor of political accountability. Minnesota's own laws demonstrate a commitment to regulating the conduct of judicial elections precisely because they seek to preserve the proper administration of justice and the fundamentally apolitical nature of the judicial role.

A. Judges, Even Elected Ones, Do Not Hold "Political" Office.

Petitioners and their *amici* place great reliance on this Court's cases considering the regulation of speech in the con-

text of elections for *legislative and executive* office. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding state law prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of entrance to polling place); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down State early filing deadline for office of President of the United States); *Brown v. Hartlage*, 456 U.S. 45 (1982) (striking down restriction on campaign pledges by county commissioner); *Buckley v. Valeo*, 424 U.S. 1 (1976) (assessing constitutionality of Federal Election Campaign Act applicable to candidates for federal elective office). Indeed, "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for *political* office." *Eu v. San Francisco County Democratic Cen. Comm.*, 489 U.S. 214, 223 (1989) (internal quotations and citation omitted) (emphasis added) (invalidating restrictions regulating the official governing bodies of political parties). Yet judges — whether elected or appointed — do not hold "political" office. Put most simply, "judges are not politicians," *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 953 (D.C. Cir. 1984), nor should they be.

Whereas we expect the legislative and executive branches of government to remain responsive to the views and preferences of those who elected them, there is a "long-standing Anglo-American tradition of an independent Judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). Unlike political officials, who serve voters by carrying out their wishes, the responsibility of a judge is to decide each case based on the law and the rights of the litigants before them, including every litigant's fundamental constitutional right to a fair and unbiased proceeding. *See Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (Due Process Clause entitles all litigants to an adjudication before a judge "with no actual bias against the defendant or interest in the outcome of his particular case"); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of

due process.").[2] State judges — including elected ones — owe their primary loyalty to the law, and to their "solemn responsibility . . . to guard, enforce, and protect every right secured by the Constitution of the United States." *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1973) (internal quotation marks omitted).

This "solemn responsibility" requires judges in the conduct of their office to stand apart from the political majority. Judicial decisions often carry significant public consequences, and the work of judges can therefore elicit strong public responses. While political officeholders typically can, should, and do consider the wishes of the public in their decisionmaking, judges are required to disregard such considerations in all instances. "[I]t is the business of judges to be indifferent to popularity." *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991) (quoting Stevens, The Office of an Office, Chicago Bar Rec. 276, 281 (1974)). "[T]he judge is often called upon to disregard, or even defy, popular sentiment," *id.* at 400, by making decisions that are at once unpopular and compelled by law. *See id.* at 410-11 (Scalia, J., dissenting) ("[I]t is the prosecutor who represents 'the People'; the Judge represents the Law — which often requires him to rule against the People."). This principle may fairly be characterized as the bulwark of our constitutional system. *See, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that a conviction for burning an American flag violates the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (protecting free-speech rights of Ku Klux Klan); *United States v. Brown*, 381 U.S. 437, 445 (1965) (function of independent judiciary is to protect civil rights of unpopular persons from "popular clamor" – rights that are not likely to be as well-protected by political branches); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (First Amendment protects both popular and unpopular viewpoints). Without it, only the popular or the politically correct would enjoy the secure protection of the law.

Democracy is enhanced when politicians announce their positions on the issues they will face in office and promise the public to act in certain ways; in the political sphere, "[c]andidate commitments enhance the accountability of government officials to the people whom they represent." *Brown v. Hartlage*, 456 U.S. at 55. But the very same behavior would be not only wholly improper but also disastrous for judges, compromising their core duty to consider every litigant's case on its own merits, and reducing the chances they will stand against the political majority when required.[3] As the Chief Justice has said, for a candidate for judicial office "to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (Rehnquist, J., mem.). Thus, the normal pressures of political office are fundamentally incompatible with the judge's overriding constitutional duty of impartiality. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion) (upholding Texas statute requiring State judges to resign from the bench before running for elective office because State may legitimately prohibit them from exposing themselves to pressures inconsistent with judicial oaths); *cf. Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J.,

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2 *See also Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion) (although "it is to be expected that a legislator will vote with due regard to the views of his constituents," it "is a serious accusation to charge a judicial officer with making a politically motivated decision").

3 *Amici* supporting the petitioners concede as much. *See* ACLU Br. at 10 n.6 (acknowledging that precommitment is "incompatible with the judicial function" even as it is not incompatible with the legislative function).

dissenting) ("The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their fealty to the death penalty.") (footnote omitted).

In short, the institutional role of the judge is fundamentally different from that of the legislative or executive official, and the give and take of policy commitments and promises that are the grist of campaigns for *political* office is at base inconsistent with the judge's fundamental duties of independence and impartiality. For that reason, the campaign speech of a judge or a judicial candidate may threaten compelling state interests where the same speech by a political candidate would not. As Justice Frankfurter wrote, "Judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions." *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting).

B. Minnesota Has Not Forfeited Its Interest in Judicial Independence and Impartiality by Deciding to Elect Its Judges.

Petitioners and their supporting *amici* do not dispute the importance of judicial impartiality or independence, nor could they. Instead, they suggest that once a State makes the choice to elect its judges, its interest in judicial independence ceases to be sufficiently compelling to justify restraints on candidates' pronouncements on issues they are likely to face.[4] However a State selects its judges, its interest in an

[4] *See, e.g.*, ACLU Br. at 6 ("There is no 'judicial candidate' exception to the First Amendment.").

independent, impartial, and apolitical judicial system is fundamental. States that elect their judges properly expect those judges to perform their day-to-day duties with the same level of impartiality and professionalism as judges in other States. Indeed, were it otherwise, election of judges might itself present serious constitutional difficulties. This Court has never suggested that the Due Process Clause's guarantee of a "fair trial in a fair tribunal" turns on whether the judicial tribunal in question is elected or selected. *Cf. Steffel*, 415 U.S. at 460-61 (observing that state judges have responsibility to enforce all federal constitutional rights). On the contrary, an elected judge's duties are identical to those of an appointed judge. *See, e.g., Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when they are all elected . . . ."); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary . . . .").

While the State of Minnesota has elected its judges since 1857, it has also adopted special safeguards for judicial elections that make two things clear: first, that the State believes that elections for judges are significantly different from elections for political office, and second, that the State has a significant interest in maximizing the day-to-day independence of its judges, notwithstanding that they are elected. Minnesota's Constitution provides judges with longer terms of office (six years) than it does for State legislators (two years for representatives or four years for senators) or the Governor (four years).[5] These longer terms insulate judges from political pressures and the short-term judgments of voters. Moreover, the State Constitution requires judges wishing to run for political office to resign their judgeship before formally

[5] Minn. Const. art. 4, § 4 (state representatives and senators); Minn. Const. art. 5, § 2 (governor).

declaring their candidacy.[6] On the issue of qualifications for office, Minnesota's Constitution requires that all holders of judicial office be "learned in the law,"[7] thereby obligating those elected as judges to follow the ethical standards of the legal profession. *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992) (en banc). Moreover, the state Constitution contains special rules for judicial vacancies. When such openings occur, the governor appoints an interim judge, and that judge does not run for election until the next general election occurring at least one year after the appointment.[8] This system allows the interim judge some initial "breathing room" free from political pressure. 490 N.W. 2d at 422-23. The Minnesota Legislature has supplemented these protections by making judicial elections non-partisan,[9] in order to counter the potential conflicts "aris[ing] between the demands of an election process and the judicial impartiality required to decide cases free from political maneuvering." 490 N.W.2d at 422. Finally, of course, Canon 5(A)(3)(d)(i) itself provides an essential safeguard. As the Eighth Circuit noted, the Minnesota Supreme Court likely enacted Canon 5(A)(3)(d)(i) "to prevent judicial campaigns from becoming routine political contests, thereby jeopardizing the independence and integrity of the State's judiciary." Pet. App. 51a.

Together, these provisions — which apply only to the election of judges — protect the independence and impartiality of Minnesota's judges, even though they are elected. As the Supreme Court of Minnesota has said, "[w]hile the framers of our state constitution have developed a system of [judicial] selection and election quite different from [the] federal scheme, they too designed a plan to recognize the

6 Minn. Const. art. 6, § 6.

7 *Id.* § 5.

8 Minn. Const. art. 6, § 8.

9 Minn. Stat. § 204B.06, subdiv. 6.

uniqueness and independence of the state judiciary." 490 N.W.2d at 420.[10] Petitioners' suggestion that the State has somehow waived or diminished its interests in avoiding judicial prejudice and the appearance of prejudice is simply wrong.

II. THE STATE OF MINNESOTA HAS COMPELLING INTERESTS THAT JUSTIFY ITS ATTEMPT TO PREVENT JUDICIAL CANDIDATES FROM ANNOUNCING THEIR PREDISPOSITIONS ON ISSUES LIKELY TO COME BEFORE THEM AS JUDGES.

The Minnesota Supreme Court construed Canon 5(A)(3)(d)(i) narrowly by adopting the Eighth Circuit's limited reading of the provision. *In re Code of Judicial Conduct*, No. C4-85-697, 2002 WL 126537 (Minn. Jan. 29, 2002). Accordingly, as a matter of state law, Canon 5(A)(3)(d)(i) now restricts judicial candidates "only from making known how they would decide issues likely to come before them as judges." Pet. App. 53a. Thus, the speech at issue in this case are statements by judicial candidates indicating or promising how they would rule in cases likely to come before them—in essence, committing themselves to an outcome before hearing the merits of a case.

The State of Minnesota has several compelling interests that justify placing reasonable regulations on these kinds of statements. First, the State has a compelling interest in protecting the integrity and impartiality of its judiciary against

10 Indeed, Petitioners acknowledge that the point of all the safeguards described in the text is to further the State's interest in preserving the independence and integrity of its judges, notwithstanding their election. *See* Wersal Br. at 37 (noting that "Minnesota's electorate strongly supports judicial impartiality . . . Minnesota's citizens voluntarily established a judicial system that is structured throughout to ensure impartiality"); RPM Br. at 5 (noting that Minnesota's judicial election system is designed to protect "the institutional independence of the courts and the individual independence of judges").

the corrosive effects of ambition and popular pressure, and campaign promises inconsistent with the judicial role. Second, the State has a compelling interest in protecting its judiciary's *appearance* of integrity. Finally, the State has a compelling interest in protecting the finality of its judgments against claims by disgruntled litigants that their elected judges have openly prejudged cases; however often such Due Process challenges would succeed, the State has an interest in avoiding the rounds of extra litigation that would inevitably ensue.

A. Minnesota Has a Compelling Interest in Reasonable Speech Regulations Protecting the Actual Integrity and Impartiality of Its Judiciary.

As this Court has made clear in the context of cases evaluating speech restrictions on government employees, the government has a compelling interest in upholding the integrity of its institutions. *See, e.g.*, *Eu*, 489 U.S. at 231-32 (in First Amendment context, "a State indisputably has a compelling interest in preserving the integrity of its electoral process"). This interest is particularly important where independence from political pressures is an important element of the institution or office being protected, an interest recognized by this Court when it upheld wide-ranging restrictions on the political activities of Executive Branch employees against First Amendment challenge in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973). This Court explained that Congress could constitutionally require the imposition of such restrictions on unelected federal employees because their office required them to "administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They [can be] expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Id. at* 564-65; *see also id.* at 557 (upholding constitutionality of Hatch Act's bar on political activities by non-political civil servants on the theory that "federal service should depend upon meritorious performance rather than political service, and that political influence of federal employees on others and on the electoral process should be limited."). The values of impartiality, fairness, and integrity are undoubtedly at least as compelling where the judiciary is concerned, and likewise support reasonable restrictions on election speech. *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality) ("The State's interests are especially important with regard to judicial officers.").

Indeed, this Court has recognized that the political pressures judges face in election campaigns pose very real risks to their work on the bench. In *Clements v. Fashing*, the Court upheld a State law requiring judges to resign before running for political office on the ground that "[a] campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office." *Id.* Permitting judicial candidates to stake out positions on the issues likely to come before them if elected would pose a similar risk. As the Third Circuit has explained,

> If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.
>
> . . . [T]he judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991). *See also Deters v. Judicial Retirement & Removal*

Comm'n, 873 S.W.2d 200, 205 (Ky. 1994) ("Justice can hardly be blind if the judge has made a pre-election commitment or prejudgment which causes him or her to apply the blindfold only as to one side of an issue.").

These concerns are especially acute in the context of criminal trials. Criminal defendants depend more than any other litigant on the judge's impartiality: There are often strong political pressures calling for conviction, and criminal defendants depend on the judge to enforce their constitutional and procedural rights even when doing so is politically unpopular. The judge in a criminal trial "decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury." *Bracy v. Gramley*, 81 F.3d 684, 701 (7th Cir. 1996) (Rovner, J., dissenting), *rev'd*, 520 U.S. 899 (1997); *accord Carter v. Kentucky*, 450 U.S. 288, 302 n.20 (1981) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest wor[d] or intimation is received with deference, and may prove controlling." (collecting empirical evidence) (internal quotation omitted).

At the same time, popular sentiment often induces candidates for judicial office to run for election on promises to be "tough" on criminal defendants. These statements can commit judges to act in ways that adversely affect defendants' right to a fair trial. For instance, a judge in the State of Washington once pledged that among all candidates in the race, he would be the "toughest on drunk driving." *In re Kaiser*, 759 P.2d 392, 394, 396 (Wash. 1988) (en banc). In Ohio, a judge running for reelection stated that he "favors the death penalty for [all] convicted murderers." *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422, 425 (Ohio 1999). A judge on Texas Court of Criminal Appeals — the court of last resort for many criminal appeals — made

the following statement in his reelection campaign: "I'm very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim." Clay Robison, *Judge's Politics an Exception to Rulings*, Hous. Chron., Feb. 4, 2001, at 2. Finally, in a recent disciplinary decision, the Indiana Supreme Court held that a trial judge who pledged in campaign statements to "stop suspending sentences" and "stop putting criminals on probation" had signaled to voters that he would "decide cases in his court without regard to evidence or applicable rules of law." This, the court found, was "inconsistent with a judge's duties to impose sentences in accordance with the law and the evidence. Nothing less than the constitutional right to due process commands such an approach to a judge's duties." *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1999) (per curiam).

If there were any doubt that election promises like these influence candidates' behavior when they take the bench, one need only look to the statements they make when standing for *re*-election. Despite regulations like Canon 5(A)(3)(d)(i), some sitting judges have campaigned for re-election based on how faithfully they have carried out their initial promises to be "tough on crime." One candidate in a recent Madison County, Indiana, judicial campaign, for example, ran the following television advertisement:

> "When Judge Spencer ran for judge of the Circuit Court, he promised to send more child molesters to jail . . . burglars to jail . . . drug dealers to jail . . . ." The advertisement depicted a cell door slamming shut with each statement. The narrator stated in conclusion, "He's kept his promise. Let's keep Judge Spencer." The [judge] appeared in his judicial robe at the beginning and at the end of the advertisement.

In re Spencer, 759 N.E.2d 1064, 1065 (Ind. 2001) (per curiam) (ellipses and brackets in original). And in Illinois, a

sitting judge campaigned for reelection on the claim that he had "never written an opinion reversing a rape conviction." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 226 (7th Cir. 1993).

There is every reason to believe, as Minnesota has concluded, that once elected, candidates feel pressure to live up to their promises to be tough on crime. By committing judicial candidates to certain positions on issues likely to come before them, statements like these threaten the integrity of the judicial system and its ability to consider individual cases on their merits. Moreover, those litigants who need the protections of an impartial judge the most — politically unpopular groups, such as criminal defendants — are the ones who are most at risk. The State of Minnesota has reasonably concluded that campaign statements by judicial candidates announcing their predispositions on issues likely to come before them on the bench significantly undermine the independence and impartiality of the State's judiciary and should not be permitted.[11]

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[11] Respondent Republican Party of Minnesota suggests that such problems can adequately be remedied (and hence, the state interest in the finality of its judgments can be protected) through the process of recusal for biased judges. RPM Br. at 38. This suggestion is incorrect. First, recusal on a case-by-case basis will often not provide a sufficient remedy, even if performed on an error-free basis, because many recusal statutes require proof of "special prejudice," and judicial prejudice can be near-impossible to prove, even where it is present. *See United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir. 1967) ("Few claims are more difficult to resolve than the claim that the trial judge, presiding over a jury trial, has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one."). States have an interest in preventing all kinds of prejudice and bias, and even if judges were to recuse themselves in cases where "special prejudice" were proven, States have an interest in preventing even such lesser levels of prejudice that might not warrant recusal standing alone. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60-62 (1972). Second, States have a legitimate interest in not having their judges recused in wide categories of cases. A judge who has declared as a candidate his prejudgments as to wide categories of cases (e.g., statements as to all criminal defendants, or all murderers) could be recused from all such cases. This practical result could have serious consequences for a State seeking to administer its system of justice in a sensible and efficient manner. Finally, a case-by-case recusal rule for dealing with bias caused by judicial candidates' prejudgments would do nothing to prevent the declaration of such prejudgments in the first instance, which by their very utterance undermine the judiciary's appearance of integrity.

B. Minnesota Has a Compelling Interest in Reasonable Speech Regulations Protecting the Appearance of the Integrity of Its Judiciary.

In addition to its interest in maintaining the actual integrity of its judiciary, the State of Minnesota has an equally compelling interest in maintaining the judiciary's *appearance* of integrity. As this Court has long recognized, in order to fulfill the basic due process requirement of a trial that is free of bias, "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955) (internal quotations and citation omitted). "Even if there is no actual, demonstrable impact from a judge's refusal to recuse himself or herself" in a case where the judge's impartiality reasonably may be questioned, "there is presumptively a significant impact on the trust of the public and the litigants in an impartial judiciary." *In re Schenck*, 870 P.2d 185, 208 (Or. 1994) (per curiam). Solely to avoid the appearance of impropriety, this Court has ruled broadly that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136.

The State of Minnesota is entitled to conclude that a judicial candidate who announces her predisposition on an issue (and may be turned out of office at the next election for failing to act consistently with that announcement) will have an inappropriate "interest in the outcome" if that issue comes before her as a sitting judge. The State may also conclude that such a campaign announcement would present the appearance of an unseemly *quid pro quo* of votes for judicial

rulings that would undermine the judiciary's appearance of impartiality.

Finally, this Court has noted that under the Constitution, a state is entitled to "protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). Judicial candidates, through political pressures relating to issues likely to come before them, may confuse the public about the proper role of the courts. When judicial candidates' statements go beyond general statements of their judicial philosophy and venture into the realm of predisposition, the threat of confusion becomes very real. *See, e.g., Nevius v. Warden*, 944 P.2d 858, 860 (Nev. 1997) (per curiam) (Springer, J., dissenting) ("It goes beyond 'tough on crime' for a judge to claim that he is a 'crime fighter,' especially when, on top of this, the judge identifies his principal election supporter as being the State's attorney general. Judges are supposed to be *judging* crime not fighting it."). As one observer has noted,

> the courts do not define what activity is criminal; they do not catch criminals; they do not supervise them in prison or on probation or parole; and to whatever extent social conditions, such as poverty, prompt crime, the conditions are beyond the courts' control. To pretend that the problem of crime is simple, and that it will dissolve before a judge's decree, is to betray the ideals on which our nation rests.

Edmund B. Spaeth, Jr., *Reflections on a Judicial Campaign*, 60 Judicature 10, 13-14 (1976). Whereas judicial campaigns offer an opportunity for the public to gain a better understanding of the work performed by the judiciary, it remains critically important that such elections are conducted in a way that does not destroy Minnesota's interest in an independent judiciary. Canon 5(A)(3)(d)(i) strikes this balance in an appropriate manner.

C. Minnesota Has a Compelling Interest in Regulations That Protect the Finality of Judgments Entered in Its Courts and Avoid Unnecessary Litigation.

Finally, the State of Minnesota has a compelling interest in protecting the finality of criminal and civil judgments entered in its courts. *See Custis v. United States*, 511 U.S. 485, 497 (1994) ("Inroads on the concept of finality tend to undermine confidence in the integrity of [court] procedures and inevitably delay and impair the orderly administration of justice.") (internal quotations and citations omitted). Because rulings by judges who have made campaign statements suggesting a predisposition on the issues litigated are more vulnerable to due process challenges under this Court's precedents, Minnesota has a compelling interest in regulating the statements that give rise to these challenges. Even if relatively few of these due process challenges would ultimately succeed, the State has an interest in avoiding the uncertainty generated by the pendency of such challenges. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (acknowledging "the State's interest in the finality of its criminal judgments").

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. One of the essential pillars of a fair trial, of course, is an open-minded and disinterested judge. When a party claims to have been deprived of due process on the basis of judicial bias, "the test is whether the [judicial officer's] situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . ." *Ward*, 409 U.S. at 60 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (alteration in original)). Whatever the source of the alleged bias, the decisionmaker, at a minimum, must be "capable of judging a particular controversy fairly on the ba-

sis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941).

In *Ward*, this Court invalidated a local ordinance permitting the town mayor to serve as a judge in cases involving violations of ordinances and traffic laws. *See* 409 U.S. at 60. Even though the mayor received no direct payments as the result of the judgments he rendered, this Court found that the potential for contributions to the municipal fisc, which the mayor had a responsibility to protect, was sufficient to create a "possible temptation" to the mayor to rule in favor of the town to collect the fines, and that, accordingly, the arrangement violated the defendant's due process rights. *See id.* at 58, 60. Where a judicial candidate promises to rule in a particular way or makes sweeping policy proclamations — particularly with respect to unpopular groups such as criminal defendants — the temptation to make good is at least as strong.

Rulings consistent with campaign statements demonstrate both that the judge keeps her word and that she is "tough on crime." In such situations, as in *Ward*, the "incentive to disregard the presumption of innocence" may violate the Due Process Clause. *Mann v. Thalacker*, 246 F.3d 1092, 1097 n.2 (8th Cir.), *cert. denied*, 122 S. Ct. 541 (2001). Minnesota accordingly has a compelling interest in avoiding such a result.

CONCLUSION

For the foregoing reasons, compelling government interests support the reasonable regulation contained in Canon 5(A)(3)(d)(i).

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